Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

SAMMY'S OF MOBILE, ET AL., Petitioners,
v.
CITY OF MOBILE, ALABAMA, Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Luke Charles Lirot, Esquire
Luke Charles Lirot, P.A.
112 East Street, Suite B
Tampa, Florida 33602
(813) 221-9533
Counsel for Petitioners

December 18, 1998

QUESTIONS PRESENTED

1. Whether a local government can adopt an ordinance which is clearly content-based and prohibits expression only as to forms of conduct that are inherently and traditionally communicative?

2. Whether a local government can adopt a content-neutral or content-based form of legislation with a complete failure to establish either the existence or advancement of a legitimate governmental interest, in direct conflict with this Court's decision in *44 Liquormart v. Rhode Island, infra.*?

3. Whether a local government may condition the conferral of a benefit on the surrender of a constitutional right in order to engage in First-Amendment protected activities in direct conflict with the "doctrine of unconstitutional conditions" set forth in this Court's decision in *Perry v. Sindermann, infra.*?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Sammy's of Mobile, Ltd., an Alabama Limited Partnership, Sammy's Management Company, Inc., an Alabama Corporation, J & B Social Club, # 1, Inc., d/b/a The Candy Store, Jennifer Q. Bodiford, and the Respondent, the City of Mobile, Alabama.

There are no entities to report or list pursuant to Supreme Court Rule 29.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	16
I. THE CIRCUIT COURTS ARE DRAMATICALLY SPLIT AS TO THE NECESSITY FOR LOCAL GOVERNMENTS TO ESTABLISH AND SUPPORT A "LEGITIMATE OR SUBSTANTIAL GOVERNMENTAL OBJECTIVE" WHEN ENACTING LEGISLATION AFFECTING SPEECH.	24
II. THE *SAMMY'S* DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.	27
CONCLUSION	29
APPENDICES	
Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir. 1998), *rehearing denied,* 156 F.3d 188 (11th Cir. 1998) (May 8, 1998)	1a

TABLE OF CONTENTS (Continued)

J & B Social Club #1, Inc. v. City of Mobile, 966 F.Supp. 1131 (S.D. Ala. 1996) (October 2, 1996) 35a

J & B Social Club #1, Inc. v. City of Mobile, 920 F.Supp. 1241 (S.D. Ala. 1996) (March 26, 1996) 53a

Sammy's of Mobile, Ltd. v. City of Mobile, 928 F.Supp. 1116 (S.D. Ala. 1996) (March 6, 1996) 65a

Sammy's of Mobile, Ltd. v. City of Mobile, rehearing denied, 156 F.3d 188 (11th Cir. 1998) 77a

Letter from William K. Suter, Clerk, November 4, 1998 (granting extension of time to and including December 18, 1998) 79a

Ordinance 03-003, City of Mobile, Alabama 80a

TABLE OF AUTHORITIES

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484, 116 S.Ct 1495, 134 L.Ed.2d 711
(1996).....7, 8, 9, 10, 12, 16, 22, 23, 26, 28, 30

Acorn Investments v. City of Seattle, 887 F.2d 219 (9th Cir.
1989).....26

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456,
34 L.Ed.2d 504
(1991).....10,11,12,13,14,20,21,22,23,24,25,26,30

Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir.
1982) 25

BSA, Inc. v. King County, 804 Fed. 2d 1104, 1108 (9th Cir.
1984) 26

California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34
L.Ed.2d 342
(1972).....8,10,12,17

Clark v. Community for Creative Non-Violence, 468 U.S.
288 (1984) 18

Di Ma Corp. v. City of St. Cloud, 562 n.W.2d 312, 321
(Minn. Ct. App. 1997).....21

DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 408-411
(6th Cir. 1997).....26

*Dodger's Bar and Grill, Inc. v. Johnson County Bd. Of
County Commissioners*, 32 F.3d 1436 (10th Cir.
1994) 26

TABLE OF AUTHORITIES (Continued)

Edenfeld v. Fane, 113 S.Ct. 1792 (1993).....27

Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).....17

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596 (1990) 17,27

G & V Lounge, Inc. v. Michigan Liquor Control Com'n, 23 F.3d 1071 (6th Cir. 1994).....29

Grand Faloon Tavern, Inc., v. Wicker, 670 F.2d 943 (11th Cir. 1982).....13, 14

International Eateries of America, Inc. v. Broward County, Florida, 941 F.2d 1157 (11th Cir. 1991).....13, 15

J & B Social Club #1, Inc. v. City of Mobile, 920 F.Supp. 1241 (S.D. Ala. 1996).....7

J & B Social Club #1, Inc. v. City of Mobile, 966 F.Supp. 1131 (S.D. Ala. 1996).....8

Keyishian v. Board of Regents, 385 U.S. 589, 606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967) 29

Krueger v. Pensacola, 759 F.2d 851 (11th Cir. 1985).....14, 25

Leverett v. City of Pinellas Park, 775 F.2d 1536 (11th Cir. 1985).....25

TABLE OF AUTHORITIES (Continued)

MD II Entertainment, Inc. v. City of Dallas, Texas, 28 F.3d 492 (5th Cir. 1994).....27

Miller v. Stuart, 117 F.3d 1376 (11th Cir. 1997).....29

Nakatomi Investments, Inc., v. City of Schenectady, 949 F. Supp 988 (N.D.N.Y. 1997).....27

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).....12, 28, 29

Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997).....26

Police Dep't v. Mosley, 408 U.S. 92, 99 (1972).....18

R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).....18

Redner v. Dean, 29 F. 3d 1495 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 1697 (1995).....24

Rubin v. Coors Brewing Co., 115 S.Ct. 1585 (1995).....27

Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).....18

Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir. 1998), *rehearing denied*, 156 F.3d 188 (11th Cir. 1998).....*passim*

Sammy's of Mobile, Ltd. v. City of Mobile, 928 F.Supp. 1116 (S.D. Ala. 1996).....7

TABLE OF AUTHORITIES (Continued)

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).....22

Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).....29

SOC, Inc. v. County of Clark, 152 F.3d 1136 (9th Cir. 1998).....26

Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).....13

Thomas v. Collins, 323 U.S. 819 (1945).....25

TK's Video, Inc. v. Denton County, Tex., 24 F.3d 705, 707 (5th Cir. 1994).....18

Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994).....21, 25, 26

Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).....18

Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).....18

United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).....8,10,11, 12, 13,14,19

Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).....14,15,17,20,21,24

TABLE OF AUTHCRITIES (Continued)

OTHER AUTHORITIES

John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975) 18

David L. Hudson, Jr., *The Secondary Effects Doctrine: the Evisceration of First Amendment Freedoms*, Washburn L.J., Vol. 37, No. 1, 55-94.....19

William C. Kelly & Jeannette A. Remetich, *Town of Islip v. Caviglia: "Secondary Effects" – Censorship in Disguise*, 5 J. Legal Commentary 149, 177-78 (1989).....20

Melvin Nimmer, *Nimmer on Freedom of Speech* § 2.07 (1984).....20

Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 Cooley L. Rev. 1, 3-6 (1989).....19

Frederick Schauer, *Categories and the First Amendment: a Play in Three Acts*, 34 Vand. L. Rev. 256 (1981).....18

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On Petition for Writ of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Petitioners, Sammy's of Mobile, Ltd., et al., respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 140 F.3d 993 (11th Cir. 1998) (App., *infra*, 1a – 34a). The denial of rehearing and rehearing en banc is reported as a table decision at 156 F.3d 188 (11th Cir. 1998) (App., *infra*, 77a – 78a). The opinion of the district court granting the City of Mobile's Motion for Summary Judgment is reported at 966 F.Supp. 1131 (S.D. Ala. 1996) (App., *infra*, 35a – 52a). The opinions of the district court denying Petitioners' Motions for Preliminary Injunction are reported at 920 F.Supp. 1241 (S.D. Ala. 1996) (App., *infra*, 53a – 64a) and 928 F.Supp. 1116 (S.D. Ala. 1996) (App., infra, 65a –76a).

JURISDICTION

The court of appeals entered its judgment on May 8, 1998 (App., *infra*, 1a – 34a). A timely petition for rehearing and rehearing en banc was denied on August 5, 1998 (App., *infra*, 77a – 78a). A timely application for extension of time within which to file a petition for a writ of certiorari to and including December 18, 1998, was granted by Justice Anthony M. Kennedy on November 4, 1998 (App., *infra*, 79a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law ... abridging the freedom of speech ...

Amendment V

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "...nor shall any person be ... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

Amendment XXI, Section 2

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited.

UNITED STATES CODE

42 U.S.C. Section 1983

42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of state law…subjects, or causes to be subjected, any citizen…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law…" 42 U.S.C. § 1983.

ORDINANCES ENACTED BY
THE CITY OF MOBILE, ALABAMA

Ordinance 03-003, Ordinance of the City of Mobile, Alabama, is reprinted and included in its entirety in the Appendix (App., *infra*, 80a – 82a).

STATEMENT OF THE CASE

Petitioners, Sammy's of Mobile, Ltd., an Alabama Limited Partnership; Sammy's Management Company, Inc., an Alabama Corporation, J & B SOCIAL CLUB, # 1, INC., d/b/a The Candy Store and Jennifer Q. Bodiford, are the entities that are involved with two businesses, "Sammy's" and "The Candy Store," both of which offer

entertainment to the public in the form of recorded music and exotic dance performances in which the expressive content of the performances places an emphasis on sexual expression and the interest in human sexuality that all human beings possess to a greater or lesser degree.

As an integral part of the Petitioners' businesses, each had obtained an "ABC" license and approval by the City of Mobile for such license to "dispense alcoholic beverages, spirits brewed, malt beverages, and vinous beverages." Quite simply, "Sammy's" and "The Candy Store" were what is colloquially referred to as "topless dancing clubs" serving alcohol.

Both "Sammy's," and "The Candy Store," filed all appropriate applications, and obtained approvals and entitlements from the City of Mobile to operate alcoholic beverage establishments. At the time of the investigation by the City of Mobile of the applications filed by "Sammy's," the "topless dancing" nature of the business was made known to the City, the Mayor, and the Council.

"Sammy's" ABC license was approved and issued on March 15, 1993. In reliance on the approval of the above-referenced application and the issuance by the State of Alabama of the ABC license, "Sammy's" bought the property and constructed a new building at 3106 Airport Boulevard, Mobile, Alabama, with the specific intent of creating an upscale topless dance club that included the integral component of offering the responsible consumption of alcoholic beverages in conjunction with the presentation of exotic dance performances. "Sammy's" spent approximately $1,000,000.00 to purchase the property and construct the facility described above, with the assistance of a loan from the Small Business Administration.

The subject businesses operated without incident for several years, until on February 6, 1996, the City Council of the City of Mobile passed Ordinance No. 03-003, which purportedly banned "nudity and sexual conduct and depiction thereof, coupled with alcohol in public places," but actually only made it "unlawful for any manager, officer, agent, servant, employee, or person in charge of any establishment...licensed to sell spirituous or vinous liquors...knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, *any motion picture, show, performance or other presentation upon a licensed premises, which...depicts nudity or sexual conduct or any simulation thereof.*" (App., *infra*, __ a – __ a). (Emphasis added).

The Ordinance was first circulated to members of the City Council on February 1, 1996. At that time, it was not on the agenda for the next scheduled meeting of February 6, 1996. The Ordinance was then added to the Council's agenda on Friday, February 2, 1996. There was no publication of the agenda nor any notice provided to the public until Sunday, February 4, 1996, when the City Council's agenda was published in the local newspaper simply as a courtesy and not as a requirement of any state or local procedure. The principals of "Sammy's" did not learn of the Ordinance until the morning of Tuesday, February 6, 1996.

On February 6, 1996, a Pre-council meeting was held, at which time the City of Mobile's Director of Public Safety, ultimately stated that there was no evidence to show any significant law enforcement problem at any of the subject businesses, nor had there been any exceptional experience of criminal activity at any of the types of businesses sought to be regulated by the subject Ordinance. Nonetheless, when the City Council met, extensive public criticism was expressed as to the existence of businesses that would combine topless

entertainment with the service of alcoholic beverages, and the Ordinance was adopted.

Subsequent to the adoption of the Ordinance, which was deemed to take effect on February 28, 1996, "Sammy's" filed a civil action in the Circuit Court of Mobile County, Alabama. The state civil action challenged the Ordinance on several substantive grounds, including a deprivation of "their rights to freedom of speech, expression, association, privacy, access to courts, petition, equal protection and due process." Also alleged were deprivation of rights secured by the First, Fifth and Fourteenth Amendments to the Constitution. The state action also sought a temporary restraining order against the enforcement of the subject ordinance.

On February 26, 1996, the City of Mobile, through its Counsel, filed and served a Notice of Removal of the action to the United States District Court for the Southern District of Alabama. "Sammy's" did not challenge the removal to federal court.

During the same period of time, on March 12, 1996, "The Candy Store" filed a separate Complaint in the United States District Court for the Southern District of Alabama, Case No.: 96-0246-BH-S, naming the City of Mobile, the City Clerk, City Council Members, the Police Chief and Mayor, both in their official capacity and individually, as defendants. On March 13, 1996, the Court set a hearing for March 19, 1996. The individual Defendants filed Motions to Dismiss and supporting legal memorandum, to which responses were filed by "The Candy Store."

At the close of the Hearing, Counsel for "The Candy Store" summarized the constitutional challenges against Ordinance 03-003, and in response, Counsel for the City of Mobile emphasized that since the Ordinance

was adopted under the authority of the Twenty-First Amendment, it was virtually insulated from any constitutional challenge.

The result of the two separate cases was identical. On March 6, 1996, the district court entered an order denying the "Sammy's" motion for temporary restraining order and motion for preliminary injunction. This decision was published as *Sammy's of Mobile, Ltd., v. City of Mobile*, 928 F. Supp. 1116 (S.D. Ala. 1996) (App., *infra*, 65a – 76a). Shortly thereafter, on March 26, 1996, the district court issued an order denying "The Candy Store's" requested relief, dismissing the complaint against all individual defendants and denying the motion for preliminary injunction. This decision is reported as *J & B. Social Club, No 1, Inc., v. City of Mobile*, 920 F. Supp. 1241 (S.D. Ala. 1996) (App., *infra*, __ a – __ a).

Subsequent to the district court's denials of injunctive relief, the City of Mobile sought to consolidate the two cases, which was approved by the district court.

After a variety of other procedural motions and orders, the City of Mobile filed answers to "Sammy's" and "The Candy Store's" complaints. While the consolidated cases progressed, this Honorable Court issued its decision in *44 Liquormart, Inc., v. Rhode Island*, 517 U.S. 484, 116 S.Ct 1495, 134 L.Ed.2d 711 (1996).[1] This Court held that the Twenty-First

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[1] In *44 Liquormart,* this Court reversed a court of appeals decision which held that the State of Rhode Island had shown "inherent merit" in a state law banning the advertisement of retail liquor prices. Rejecting the idea that the Twenty-First Amendment could in some way qualify the First Amendment prohibition against laws abridging freedom of speech, the Court held that such a ban was unconstitutional because it did not directly advance the state's asserted interest in the promotion of temperance and was more extensive than necessary to serve that interest. The Court held that the Twenty-First Amendment does not license the state to ignore their

Amendment does not qualify the constitutional prohibitions against laws abridging the freedom of speech embodied in the First Amendment.

Because the City of Mobile's arguments and the district court's reasoning were significantly impacted, if not nullified, by *44 Liquormart*, both "Sammy's" and "The Candy Store" filed (separate) motions for summary judgment on August 22, 1996. The City of Mobile also filed a motion for summary judgment. On October 2, 1996, the district court issued an order granting the City of Mobile's motion for summary judgment, holding that (1) the ordinance furthered a legitimate governmental purpose and was narrowly drawn and, thus, did not violate the First Amendment, and (2) the ordinance did not violate the equal protection clause, reported at 966 F.Supp. 1131 (S.D. Ala. 1996). (App., *infra*, __ a – __ a).

The consolidated case was dismissed and judgment was entered for the City of Mobile. An appeal was filed with the Eleventh Circuit Court of Appeals on October 30, 1996.

The major points on appeal were that, as a threshold consideration, the district court erred in granting summary judgment in favor of the City of Mobile because of the many "genuine issues of material fact." It was also asserted that the adoption of the City of Mobile's Ordinance No. 03-003 was accomplished with virtually

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other obligations under other constitutional provisions. Disavowing *California v. La Rue*, 409 U.S. 109 (1972), the Court called into question a vast array of exotic dance legislation predicated solely on the Twenty-First Amendment. Using a commercial speech analysis and considerations of "a reasonable fit between legislation and its goal," the Court resurrected the *O'Brien* test (*United States v. O'Brien*, 391 U.S. 367 (1968)) in areas of legislation where the regulation of alcohol would have insulated the legislation from any constitutional challenge.

no notice to any affected business owner and, despite testimony by the City of Mobile's Director of Public Safety that the businesses in question did not engender any significant demand for police service, or otherwise cause "adverse secondary effects," the subject ordinance was adopted entirely under the authority of the Twenty-First Amendment, with no substantial, competent evidence to support its adoption.

At the time the ordinance was adopted, it was true that great deference was given to regulations adopted under the authority of the Twenty-First Amendment, however, the intervening decision of *44 Liquormart, Inc. v. Rhode Island, supra*, held by majority opinion of this Court that the use of the Twenty-First Amendment could not, by itself, justify restrictions abridging the freedom of speech embodied in the First Amendment.

It was is respectfully submitted that the District Court erred in granting summary judgment to the City of Mobile, since there was clearly a genuine issue as to material fact regarding the predicate for the adoption of Ordinance 03-003, as well as whether the City of Mobile could carry the burden of showing that the proposed restrictions contained in Ordinance 03-003 would advance any alleged governmental interest "to a material degree."

This argument was buttressed by the argument that, since the ordinance only applied to forms of conduct that were *inherently* communicative, such as "any motion picture, show, performance, or other presentation," the legislation was clearly content-based, and targeted only at traditionally expressive behavior. Additionally, it was argued that the ordinance violated the doctrine against "unconstitutional conditions" by forcing the Petitioners, and others similarly situated, to sacrifice the presentation of their desired form of expression (i.e., exotic dancing), if they wanted to enjoy the benefits conferred by their

alcoholic beverage licenses *or* give up those benefits in order to avoid any "burden" on the exercise of their First Amendment rights.

The court of appeals, by a two judge majority, held that the ordinance satisfied First Amendment restrictions on the regulation of expressive conduct. Ultimately, the majority rejected the argument adopted by the dissent that, since the ordinance restricted only "traditionally expressive activities," it was a content-based restriction that "must be evaluated under searching judicial scrutiny," and applied the "intermediate level" of scrutiny enunciated in the four-part test of *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

In their opinion, the majority identified the fact that the ordinance imposed on the Petitioners a choice between utilizing their liquor licenses presenting sexually expressive First Amendment protected performances. Regrettably, it was stated that "the Supreme Court has long upheld ordinances such as Mobile's," citing *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), and a long line of cases which, as identified in the dissent, "after *44 Liquormart*...appear to lack precedential value."

The majority continued to analyze the challenged ordinance under what they termed the "*Barnes-O'Brien* test," a hybrid of the decisions in *O'Brien* and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 34 L.Ed.2d 504 (1991), a plurality decision in which this Court, analyzing a law of general application which embodied Indiana's "prohibition against complete nudity in public places" was used as the backdrop against which this Court recognized that "nude dancing is expressive conduct within the outer perimeters of the First Amendment, though...only marginally so." *Id.* at 566,

111 S.Ct. at 2460. Under this *Barnes-O'Brien* test, the majority apparently rejected the dissent's distinctions between the Indiana law of general application and Mobile's ordinance, which targeted only traditionally expressive activities. The majority also allowed an apparent "expansion" of the holding in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (an adult entertainment *zoning* case silent on the issue of alcoholic beverages) by concluding that the district court had appropriately determined that Mobile's ordinance served a "substantial governmental interest" because the ordinance mimicked a concern that "nudity and alcohol" encouraged "undesirable behavior and is not in the interest of public health, safety and welfare." The circuit court also found that there was a "reasonable basis" for such a belief based on the "experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as their own wisdom and common sense." (App., *infra*, 7a).

In actuality, the majority declined to recognize the fact that during the adoption of Mobile's Ordinance 03-003 there was no mention of the experience of other cities, studies done in other cities, case law reciting findings on the issue, nor any "wisdom and common sense" put forth, other than the testimony offered by the City of Mobile's Director of Public Safety indicating that there was *no evidence* to show any significant law enforcement problem at any of the subject businesses, nor had there been any exceptional experience of criminal activity at any of the types of businesses sought to be regulated by the subject ordinance.

Affirming the district court, the majority concluded that "Mobile is attempting to regulate the secondary effects of alcohol and nude dancing without prohibiting either. It does not seek to ban bars or nude dancing. Everyone can still buy a drink and watch nude

dancing in Mobile. They cannot, however, do both in the same place." (App., *infra*, 12a – 13a).

Petitioners agree with the dissent's analysis that the majority "fundamentally misapprehends the restrictions that the First Amendment imposes upon governmental power to regulate expression." The dissent recognized the merit of the argument that the ordinance violated the doctrine of unconstitutional conditions, quoting the well established proposition that "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right," citing both *Perry v. Sindermann*, 408 U.S. 593[, 597], 92 S.Ct. 2694[, 2697], 33 L.Ed.2d 570 (1972), and "relying on a host of cases applying that principle during the preceding quarter-century, the court explained that government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech.' *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513, 116 S.Ct. 1495, 1513, 134 L.Ed.2d 711 (1996) (internal citation omitted)." (App., *infra*, 14a).

The dissent criticized the majority's reliance on the dicta of *44 Liquormart* that, even though *LaRue* was disavowed in so far as it relied on the Twenty-first Amendment, this Court held, "we are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment." *44 Liquormart*, at 515, 116 S.Ct. at 1514. (App., *infra*, 17a).

The dissent also criticized the majority's use of the so-called "*Barnes-O'Brien* test" by concluding that *Barnes* did not control "the case *sub judice*" because the statute challenged in *Barnes* did not single out one form

of expression for disfavored treatment and was a law of general application "focused on nudity *simpliciter* and not on forms of expressive conduct or the messages they convey." (App., *infra*, 21a).

The dissent identified that the City of Mobile ordinance applied only to forms of conduct that were inherently and traditionally communicative and noted the distinction between generally applicable, content neutral regulations, and those prohibiting conduct " '[p]recisely because of its communicative attributes.' *Cf. Int'l Eateries of Am. v. Broward County*, 941 F.2d 1157, 1161 (11th Cir.1991)...(quoting *Barnes*, 501 U.S. at 577, 111 S.Ct. at 2466 (Scalia, J., concurring in the judgment) (emphasis omitted)), cert. denied, 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). A regulation that by its terms prohibits only traditional forms of expression cannot be said to be unrelated "to the suppression of free expression within the meaning of *O'Brien* ... [and thus is] outside of *O'Brien*'s test altogether." *Texas v. Johnson*, 491 U.S. 397, 410, 109 S.Ct. 2533, 2543, 105 L.Ed.2d 342 (1989)." (App., *infra*, 21a – 22a).

The dissent also identified the distinction that the Eleventh Circuit had repeatedly distinguished between regulations proscribing nudity *per se,* including "general proscriptions on nudity in particular fora, from regulations targeted at expressive conduct." *Citing Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.1982), in which the Eleventh Circuit upheld a city ordinance banning nudity on premises where alcohol was served.

The dissent noted that:

> "[t]he ordinance, unlike the one before us now, did not single out nudity in "any motion picture, show, performance, or other presentation," but rather simply banned all

> nudity in establishments offering alcohol for sale. *See id.* at 944 n. 2. Because the regulation thus was not targeted at traditionally expressive behavior, we applied *O'Brien* scrutiny and upheld the ban. In *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985), however, we invalidated a ban almost identical to that in *Grand Faloon* because, unlike the ban in *Grand Faloon*, which was supported by a legitimate and substantial government interest in regulating activities likely to lead to breaches of the peace, the record demonstrated that the city's motive was to restrict expression. 759 F.2d at 855-56. Both cases addressed regulations that facially banned all nudity in establishments licensed to serve alcohol, rather than solely nudity in the course of traditionally expressive forms of conduct. *See Krueger*, 759 F.2d at 853-54 n. 3; *Grand Faloon*, 670 F.2d at 944 n. 2.
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> Ordinance 03-003 on its face singles out nude entertainment and thus the "erotic message conveyed" by that conduct. *Barnes*, 501 U.S. at 570, 111 S.Ct. at 2463." (App., *infra*, 23a – 24a).

The dissent also identified a significant distinction between the cases evaluating the validity of *zoning ordinances* (*Renton*, *supra*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Int'l Eateries, supra.),* and emphasized the fact that those ordinances were aimed at "secondary effects" and were permissible applying "time, place and manner scrutiny," because, unlike the Mobile ordinance (which categorically banned nude dancing in establishments that served alcohol), the zoning ordinances

allowed "reasonable alternative avenues of communication" for those businesses regulated in the zoning context.

The dissent opined:

> Indeed, zoning regulations are amenable to time, place, and manner scrutiny at least in part because, although they restrict the locations available for a given use, they generally leave some areas open for the disfavored use. *See Renton*, 475 U.S. at 54, 106 S.Ct. at 932 ("[The City has] sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning."); *Young*, 427 U.S. at 71 n. 35, 96 S.Ct. at 2453 n. 35.
>
> Unlike the zoning ordinances upheld in *Young*, *Renton*, and *International Eateries*, which preserved for adult entertainment "ample, accessible real estate," *Renton*, 475 U.S. at 53, 106 S.Ct. at 932, the City of Mobile's regulation prohibits establishments that wish to serve alcohol and present nude dancing from operating anywhere. Of course, as the City and the majority point out, appellants are free to provide nude dancing at their current locations as long as they are willing to forego the privilege of serving alcohol. (App., *infra*, 28a).

Finally, the dissent identified the fact that the City of Mobile made no showing as to the factual basis for its articulated concerns and the motivation for passage of the

ordinance beyond the conclusions stated in the ordinance itself, a showing insufficient to justify an infringement on protected expression. This lack of evidence, and the fact that such "mere assertions" as those contained in the City of Mobile's ordinance, unsupported by any legislative findings, were clearly insufficient to justify a regulation that, by its own terms, prohibited only conduct that was protected by the First Amendment. (App., *infra*, 32a – 33a).

Ultimately, the dissent identified the unconstitutional characteristics of Ordinance 03-003. The fact that it mandated that the conferral of a benefit to utilize a liquor license could not be conditioned on the surrender of a constitutional right, the fact that it was adopted solely under the auspices of the Twenty-first Amendment (a view clearly discredited under *44 Liquormart*), the fact that it was aimed solely at nudity contained *only* in traditionally expressive forms of conduct, and the fact that the ordinance was adopted with absolutely *no showing or evidence* to support the infringement on protected activity, all clearly established that the ordinance was an unconstitutional, content-based regulation.

REASONS FOR GRANTING THE WRIT

Granting the Writ in the instant case will allow this Court to provide direction and define the appropriate application of the "secondary effects doctrine" in a way that will prevent any possible abuse of cherished First Amendment rights. It will also enable this Court to address the conflict among circuits as to the necessity of the government to establish and/or advance a legitimate governmental interest as a pre-requisite to imposing legislation that ultimately restricts speech.

For the past twenty years, both the Federal and the State courts have been inundated with cases involving challenges to both local and state legislation restricting the operation of adult entertainment businesses. Initially, most of these cases dealt with zoning regulations which placed such businesses in specific locations and attempted to buffer the community from the so-called "adverse secondary effects" of such businesses. *See Young, supra*, and *Renton, supra.*

In addition to these types of regulations, significant issues have arisen regarding licensing legislation which impacted the opportunity to engage in the unfettered exercise of free speech. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596 (1990). An added dimension has also emerged and ultimately intersected this area of the law because of issues involving adult entertainment combined with alcoholic beverage regulation. This line of cases began with *California v. LaRue, supra*, and, even though not an adult entertainment case, clearly culminated in *44 Liquormart, supra.*

The principle which underscores all these issues was most succinctly stated in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975), where this Court held that "when the government, acting as a censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others," the First Amendment places strict limits on the exercise of such governmental power. Indeed, such considerations have forced the courts to struggle with defining appropriate methods to

"categorize" speech in order to properly evaluate the appropriate scope of any legislation restricting speech.[2]

To further complicate this area of the law, once the speech itself is categorized, the regulation affecting speech must then be evaluated to determine whether it is "content-based" or "content-neutral."

Content-based laws restrict expression based on the message conveyed.[3] Presumptively unconstitutional, content-based laws must advance a compelling governmental interest in the least restrictive means.[4] Content-neutral laws must satisfy a less exacting constitutional standard: they must be "narrowly tailored to serve a significant governmental interest, and... leave open ample alternative channels for communication." [5]

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2 John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975); Frederick Schauer, *Categories and the First Amendment: a Play in Three Acts*, 34 Vand. L. Rev. 256 (1981).

3 *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.")

4 *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.") (citation omitted)); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (noting that regulation of "the content of constitutionally protected speech" is permissible "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). See also *Police Dep't v. Mosley*, 408 U.S. 92, 99 (1972) (indicating through Justice Marshall that discrimination based on content was "never permitted").

5 *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 707 (5th Cir. 1994).

An added dimension to the evaluation of regulations affecting speech was the development of the "secondary effects doctrine." It was originally in the adult entertainment zoning cases that the secondary effects doctrine started to take shape. This doctrine arose as a justification to insulate what would otherwise be unconstitutional content-based regulations. Initially, the case law advancing the secondary effects doctrine based the doctrine on the "tests" enumerated in the symbolic speech case of *United States v. O'Brien*, *supra*.[6]

As this area of jurisprudence has advanced, several scholars have identified the fact that, despite its initially good intentions, the "secondary effects doctrine" has had a corrosive and potentially destructive impact on First Amendment law. Any regulatory objective, regardless of its impact on speech, can be asserted as a "secondary effect" ostensibly to support any regulation that ultimately restricts speech. Under this doctrine, a seemingly content-based law becomes analyzed as content-neutral if the speech regulation is "justified without reference to the content of the regulated speech."[7]

Primarily, the "secondary effects doctrine" developed on the theory that empirical evidence of the existence of adverse secondary effects would justify what would otherwise have been an unconstitutional, content-based regulation. Utilizing the *O'Brien* test, it was

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[6] Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 Cooley L. Rev. 1, 3-6 (1989) (stating that *United States v. O'Brien*, 391 U.S. 367 (1968), is "the source of the secondary effects analysis").

[7] *See* David L. Hudson, Jr., *The Secondary Effects Doctrine: the Evisceration of First Amendment Freedoms*, Washburn L.J., Vol. 37, No. 1, 55-94 (*quoting City of Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986)).

determined that the information generated by the City of Detroit, indicating that adult businesses had a "deleterious effect" on the City and its property values, satisfied the requirement that the regulation at issue in *Young* would "further an important or substantial governmental interest." [8]

Even from the beginning, the creation of the secondary effects doctrine was the subject of major criticism. In the dissent in *Young*, Justice Stewart termed the decision as an "aberration" in this Court's First Amendment jurisprudence[9] and accused the Court of "[riding] roughshod over cardinal principles of First Amendment law." [10] Legal commentators characterized the Court's decision as "the most dramatic departure from content-neutrality" [11] and deplored the Court's casting of a content-based law as content-neutral.

These issues raged for several years when, ultimately, this Court issued its decision in *Barnes v. Glen Theatre*. The *Barnes* case resulted in eight of nine Justices recognizing that exotic dancing was a form of expressive conduct deserving of First Amendment protection. The

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[8] Even this justification has troubled many scholars. *See* William C. Kelly & Jeannette A. Remetich, *Town of Islip v. Caviglia: "Secondary Effects" – Censorship in Disguise*, 5 J. Legal Commentary 149, 177-78 (1989) ("One cannot ignore the fact that the multitude of people look upon adult businesses with repugnance and loathsome distaste. Yet distaste for speech has never been a justification to suppress protected speech and should not be permitted to do so now.").

[9] *Young* at 87 (Stewart, J., dissenting).

[10] *Id.* at 85-86.

[11] Melvin Nimmer, *Nimmer on Freedom of Speech* § 2.07 (1984).

entertainment was deemed to be "expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Barnes*, 501 U.S. 560, 581. Undeniably, the *Barnes* decision was an extremely complex and, to many, confusing opinion, because, unlike the early adult entertainment *zoning* ordinances at issue in *Young* and *Renton,* this Court was analyzing a state-wide law of general application banning all nudity. This Court voted 5 to 4 in favor of the public indecency law at issue, however, of the five members who upheld the law, the decision was divided into three separate and distinct opinions.

Unfortunately, the *Barnes* decision has proven to be extremely complex in its application, and has led to a vast array of differing conclusions by both federal and state courts applying what they felt to be the "holding" of the case. One federal appeals court has compared understanding the *Barnes* decision to "reading tea leaves." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994). Some decisions, relying on *Barnes*, have even allowed municipalities to restrict First Amendment rights without requiring a showing of *any* empirical evidence, either local or from elsewhere, articulating any "adverse secondary effects" in order to support what would otherwise be an unconstitutional content-based regulation.[12]

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[12] Justice Souter, in his concurrence in *Barnes*, stated, "I do not believe that a State is required affirmatively to litigate this issue repeatedly in every case." This complete elimination of any "burden" on the part of the government to justify regulations which clearly ultimately restrict the freedom of speech has been adopted by numerous cases, including *Di Ma Corp. v. City of St. Cloud*, 562 n.W.2d 312, 321 (Minn. Ct. App. 1997), and most notably, the *Sammy's* case at issue in the instant petition.

While the analysis of adult entertainment regulations under this "relaxed" burden has apparently eliminated the necessity for any local government to "articulate and support" any alleged governmental interest, under the authority of the *Sammy's* case at issue herein, there is ultimately *no* requirement that a regulation be justified by a showing that it both addresses and furthers an important or substantial governmental interest.[13]

The instant case brings this issue to "critical mass," because of the fact that the evaluation of the legislation therein invoked an analysis of both *Barnes* and *44 Liquormart*. The apparent trend of eliminating the burden of the government to establish either a legitimate or substantial governmental interest, or to establish the advancement of that interest, was clearly in sharp contrast to the requirement to do so in the arena of commercial speech.

In the *44 Liquormart* decision, this Court invalidated prior decisions which seemed to suggest that the Twenty-first Amendment lent an added presumption in favor of the validity of regulations restricting otherwise protected speech, particularly when it was intertwined with the regulation of alcoholic beverages.

44 Liquormart was also the subject of multiple opinions, however, the decision clearly supported the

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[13] The slippery slope upon which this burden has been sliding for the last several years was originally, and appropriately, seen as repugnant to the constitution: "However, it is not enough for a local government to simply articulate an interest in preventing neighborhood blight; it must be prepared both 'to articulate and support,' a reasoned and significant basis for its zoning decisions." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 67, 101 S.Ct. 2176 (1981) (Blackmun, concurring) (emphasis added).

proposition that "a commercial speech regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. For that reason, the state bears the burden of showing, not merely that its regulation will advance its interest, but also that it will do so to a material degree." *44 Liquormart,* at __ US ___, 116 S.Ct. at 1509.

The reason the instant case is so important is that it provides this Court with an opportunity to define the limits of the "secondary effects doctrine," and to provide the guidance necessary for the proper understanding and appropriate application of this Court's decisions in *Barnes v. Glen Theatre, supra,* and *44 Liquormart v. Rhode Island, supra.*

Such analysis would resolve the current split in the circuit courts as to the necessity of establishing a factual basis for any articulated concerns or alleged governmental interests, and the motivation for adopting regulations, beyond the mere conclusions stated in the legislation itself. In addition to resolving these conflicts, this Court can ensure that any conflict in the instant case with the decisions of this Court can be corrected. Most importantly, however, the issues in the instant case are fundamental and recurrent.

The Framers of the Constitution would have vigorously protested and rejected any First Amendment jurisprudence which allowed for either content-based or content-neutral regulations which sought to justify restrictions on speech under the "secondary effects doctrine." The Framers would have feared that, if not properly limited, such restrictions could be used to censor virtually *any* objectionable speech.

Granting the Petition in the instant case will allow an analysis and a definition of this issue that can provide

appropriate guidelines to prevent abuse of cherished First Amendment rights, an issue always of significant national importance.

I. THE CIRCUIT COURTS ARE DRAMATICALLY SPLIT AS TO THE NECESSITY FOR LOCAL GOVERNMENTS TO ESTABLISH AND SUPPORT A "LEGITIMATE OR SUBSTANTIAL GOVERNMENTAL OBJECTIVE" WHEN ENACTING LEGISLATION AFFECTING SPEECH.

Basic to the arguments presented in this Petition is the fact that exotic performance dancing is a protected form of expression under the First Amendment, applicable to the states through the Fourteenth Amendment. Any judicial consideration of any Ordinance, as used in the instant context, must by necessity be guided by the constitutional standards applied to state control over such expression.

Under any analysis, it is absolutely critical to remain cognizant that this case involves exotic and/or performance dancing, a form of expression undeniably protected by the First Amendment. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); *Redner v. Dean*, 29 F. 3d 1495 (11th Cir. 1994), *cert. den.*, 115 S.Ct. 1697 (1995).

From the earliest decisions dealing with the regulation of adult entertainment businesses, it was established that the legislation at issue could only be justified if it regulated or addressed a legitimate governmental interest, or the prevention of the so-called "adverse secondary effects" allegedly engendered by adult entertainment establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *Young*; *Renton, supra*. A requirement of this concept was that these adverse

secondary effects be established through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982).

Indeed, in upholding the ordinance at issue in *Renton*, this Court held that, "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever *evidence* the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 53, 106 S.Ct. 925, 931 (1986) (Emphasis added).

In earlier cases, it was held that it is the character of the right, not of the limitation which determines the level of scrutiny to be given the review of any legislation impinging a First Amendment right. *See Thomas v. Collins*, 323 U.S. 819 (1945). The modern trend, however, as established in the earlier discussion for the reasons for granting the writ, *supra*, shows there is now an unfortunate level of uncertainty as to the burden of the government to establish both the existence of a legitimate governmental interest to support any restrictions impacting speech, and the showing that any such restrictions advance a legitimate governmental interest.

This vast array of differing conclusions by both federal and state courts applying what they felt to be the "holding" of the *Barnes* case was compared to "reading tea leaves." *Triplett Grille,* 40 F.3d 129, 134 (6th Cir. 1994). In that case, the court upheld the invalidation of the ordinance on overbreadth grounds, but indicated that the burden of any proof of secondary effects was vitiated

by Justice Souter's opinion in *Barnes. Triplett Grille* at 133-135.

Likewise, in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 408-411 (6th Cir. 1997), the court expressed no concern that there was no evidence developed prior to the adoption of the legislation at issue to establish the existence of adverse secondary effects. *Id.* at 410. The Third Circuit reached an entirely different conclusion in *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1997), which held that:

> When a legislative body acts to regulate speech, it has the burden, when challenged, of showing either (1) that its actions serves a compelling state interest which cannot be served in a less restrictive way, or (2) that its actions serve a substantial content-neutral state interest... it must come forward with... evidence... justifying... reasonable time, place and manner restrictions on speech. *Id.* at 172 – 173.

This position is also still the prevailing law in the Ninth Circuit, as set forth in *BSA, Inc. v. King County*, 804 F.2d 1104, 1108 (9th Cir. 1984) and *Acorn Investments v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). This, again, is in contrast to *Dodger's Bar and Grill, Inc. v. Johnson County Bd. Of County Commissioners*, 32 F.3d 1436 (10th Cir. 1994), which apparently eliminates any burden on the government to establish evidence necessitating any challenged restriction.

These conflicts are clearly complicated by the decision in *44 Liquormart*, since in that case, and its significant progeny,[14] the holding is clear that *no*

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[14] *SOC, Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998), *Miller v. Stuart*, 117 F.3d 1376 (11th Cir. 1997), and numerous other cases adopt the necessity of showing that any challenged regulation is

commercial speech regulation would be sustained if it provided only ineffective or remote support for the government's purpose and, for that reason, the state would bear the burden of showing "not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.' " *Id.* at 1509, citing *Edenfield*, 507 U.S. 761, 771, 113 S.Ct. 1792, 1800-1801 (1993), and *Rubin v. Coors Brewing Co.*, 514 U.S. ___, 115 S.Ct. 1585, 1591 (1995). At least one court has evaluated adult entertainment in the "commercial speech context." (*MD II Entertainment, Inc. v. City of Dallas, Texas*, 28 F.3d 492 (5th Cir. 1994)), and another court has *significantly* criticized restrictions on adult entertainment by questioning whether such restrictions can ever advance a legitimate governmental interest under appropriate scrutiny. *See Nakatomi Investments, Inc., v. City of Schenectady*, 949 F. Supp 988 (N.D.N.Y. 1997).

As established by the prior discussion, the circuit courts are in disarray as to how different types of speech should be categorized to help formulate an appropriate level of scrutiny for the evaluation of any regulations restricting same. Clearly, in an area which is as precious and vital to this country as the First Amendment, such a divergence of authority demands that some guidance be provided to the circuit courts in order to ensure a level of fairness and consistency to their decision making process. The secondary effects doctrine must be reconciled with the recent decisions evaluating restrictions on commercial speech, otherwise, this country is in grave danger of allowing the very types of content-based restrictions on speech most loathed by the Framers of the Constitution.

II. THE *SAMMY'S* DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.

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justified only through an evidentiary showing of the existence of a legitimate governmental interest and the advancement thereof.

As intimated in the previous section, the circuit court's decision in the case *sub judice* is in direct conflict with all previously cited cases requiring the establishment of evidence to support the existence of a legitimate governmental interest in regard to any regulation affecting speech. Without restating these arguments, it is clear that the majority in the *Sammy's* decision rejected any legitimate guidance that might be provided by the *44 Liquormart* decision.

In addition to this, as recognized in the dissent:

> [T]he majority's reasoning ignores the well-established proposition that:
>
> > '[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. In *Perry v. Sindermann*, 408 U.S. 593[, 597], 92 S.Ct. 2694[, 2697], 33 L.Ed.2d 570 (1972), relying on a host of cases applying that principle during the preceding quarter-century, the Court explained that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech.'
>
> *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513, 116 S.Ct. 1495, 1513, 134 L.Ed.2d 711 (1996) (internal citation omitted). Although the City may regulate the sale or service of alcohol, it may not

> condition the conferral of a liquor license--to which appellants concede they are not constitutionally entitled--on the forfeiture of the right to engage in expressive behavior. Because the City authorizes the punishment, by fine or imprisonment, of licensees who "exhibit, suffer, allow, permit, engage in, participate in, or [are] connected with" one form of expressive behavior, the challenged ordinance imposes a significant burden upon First Amendment freedoms. (App., infra, 14a – 15a).

The dissent clearly identified that City of Mobile Ordinance 03-003 was a clear example of the violation of the doctrine forbidding unconstitutional conditions as a prerequisite to the enjoyment of otherwise available benefits. This concept was also adopted in a case directly on point, *G & V Lounge, Inc. v. Michigan Liquor Control Com'n*, 23 F.3d 1071 (6th Cir. 1994), and, in a recently decided Eleventh Circuit Case, *Miller v. Stuart*, 117 F.3d 1376 (11th Cir. 1997).

In the instant case, the majority's suggestion that, "Everyone can still buy a drink and watch nude dancing in Mobile. They cannot, however, do both in the same place," violates this Court's decision in not only *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, but also *Keyishian v. Board of Regents*, 385 U.S. 589, 606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967) and *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963).

CONCLUSION

Petitioners, Sammy's of Mobile, Ltd., et al., respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of

Appeals for the Eleventh Circuit in this case. Clearly, the issues involved in this action go far beyond the mere facts of the instant case, and provide this Court with the unique opportunity to reconcile the misapprehensions suffered by the many state and federal courts attempting to interpret the holdings in *Barnes v. Glen Theatre* and *44 Liquormart* in a way that does not lead to the absence of "equal justice under the law."

Clearly, the instant case could hinge on the simple approval of the well-reasoned dissent which concluded that since the ordinance at issue targeted only traditionally expressive forms of activity, it was clearly content-based and unconstitutional. Even if evaluated under a more deferential content-neutral context, it is clear that this Court can provide much needed guidance in an unsettled and controversial area of First Amendment jurisprudence by granting the instant petition for writ of certiorari.

Respectfully submitted,

Luke Charles Lirot, Esquire
112 East Street, Suite B
Tampa, Florida 33602
(813) 221-9533
Counsel for Petitioners

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